ARGUMENT

Petitioners submit three reasons as supporting the petition for a writ of certiorari. As the first two reasons, petitioners claim that the opinion below conflicts with decisions of this Court. As a third reason, it is said that the opinion below decided an important question of Federal law. Each of these contentions, as we show below, is without merit.

1. Contrary to petitioners' first contention (Pet. 8-9), the opinion below does not conflict with the standard for deciding motions for summary judgment established by this Court in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). In fact, the District Court, in deciding Shell's motion for summary judgment, specifically considered this Court's recent statement in *Poller* that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." (*Id.* at 473) As the District Court further pointed out, since it has been determined in this case "that unquestionably there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law," this is an "appropriate case for even a sparing use of summary judgment procedure." (Opinion, 203 F. Supp. at 533; Pet. App. 16a-17a)

2. Contrary to petitioners' second contention, the opinion below does not conflict with the seven antitrust decisions of this Court and the two other appellate decisions referred to on pages 10 and 11 of the petition. None of these cases holds that it is improper for a court to grant summary judgment where the undis-

puted facts show, as they most certainly do here, that there is no trade restraint in, or with a substantial effect on, interstate commerce, as required by the Sherman Act.

In the opinions below, both the trial court and the Court of Appeals carefully examined each of the cases put forth by petitioners as applicable to their position. First, the District Court, after making a detailed review of the pertinent facts and a full analysis of the decisional law, decided that the undisputed facts established no trade restraint in, or with a substantial effect on, interstate commerce. Accordingly, the District Court granted the motion for summary judgment because "the jurisdictional requirements of the Sherman Act are not met." (203 F. Supp. at 534; Pet. App. 20a).

On review the Court of Appeals again thoroughly examined the undisputed facts and relevant law, and it, too, agreed "with the conclusion of the District Judge that the restrictive covenant did not involve the violation" of the Sherman Act (309 F. 2d at 309; Pet. App. 8a).

In addition to upholding the lower court's decision, the Court of Appeals noted that "the plaintiffs [petitioners here] have called our attention to authorities in which it is held that transactions in themselves local and intrastate may be within the purview of the statute if they spring from agreements whose enforcement reaches beyond the state." (Pet. App. 8a) Then, taking up each of the cases referred to by petitioners, the Court of Appeals showed why they were wholly inapplicable to the instant appeal. The Court of Appeals concluded:

> "* * * There was no combination to fix prices; no effort to deprive the plaintiff of the necessary supplies for the operation of his business, no interference with his sales of goods to the public, no direct interference with his business in any fashion, and no restraint upon the competitive sale of gasoline in the neighborhood. The single restriction was to deny him direct access from the rear of his property to the parking area of the Shopping Center or, in other words, the right to use the property of the Shopping Center as part of his place of business. The customers of the Shopping Center had free access to the defendant's place of business by using the public street in common with all other members of the traveling public. We do not think that the restriction imposed upon the defendant by the exercise of the right of the Shopping Center to choose the persons who were allowed to do business on its property amounted to an unreasonable restraint of trade within the purview of the Federal Statutes." (309 F. 2d at 310; Pet. App. 9a-10a)

We submit that this decision by the Court of Appeals is correct and does not in any conceivable way involve a conflict with any decisions of this Court.

3. Lastly this case does not, as petitioners argue, involve an important question of Federal law. (Pet. 12-13) Indeed, the validity of the exclusive covenant in the Shell-Middlesex lease is uniquely a question of local law. Such covenants have been repeatedly upheld in the state courts. See *Slice* v. *Carozza Properties, Inc.*, 215 Md. 357, 137 A. 2d 687 (1958) (exclusive covenant in lease to sell alcoholic beverages in shopping center); *Glen Burnie Shopping Plaza* v. *Schreiber*, 220 Md. 303, 152 A. 2d 807 (1959) (exclusive right for food market within shopping center);

Carter v. *Adler*, 138 Cal. App. 2d 63, 291 P. 2d 111 (1955) (exclusive provision for supermarket); *Loblaw, Inc.* v. *Warren Plaza, Inc.*, 163 Ohio St. 581, 127 N.E. 2d 754 (1955) (no other food market within stated radius).

The District Court in its opinion stated: "The Maryland cases have carefully considered restrictive covenants like that contained in Article IA of the [Shell] lease and have upheld their validity, irrespective of the motive and purpose of their enforcement." (203 F. Supp. at 534; Pet. App. 20a) In addition to the Maryland cases cited above, the District Court discussed and referred to still other Maryland decisions: *Guerand* v. *Dandelet*, 32 Md. 561 (1870); *Griffin* v. *Guy*, 172 Md. 510 (1937); *Snavely* v. *Brown*, 143 Md. 75 (1923); *Schmidt* v. *Hershey*, 154 Md. 302 (1928); *Belvedere Hotel Co.* v. *Williams*, 137 Md. 665 (1921) (203 F. Supp. at 534-535; Pet. App. 20a)

The District Court also considered the recent Maryland Court of Appeals case, *Maryland Trust Company* v. *Tulip Realty Company of Maryland*, 220 Md. 399, 153 A. 2d 275 (1959). The factual situation of that case is remarkably similar to this proceeding. In *Tulip*, the Maryland Court of Appeals not only recognized the right of a lessee of a shopping center to have a barrier or fence erected to protect its parking area, but sustained and approved the issuance of a mandatory injunction requiring the shopping center to erect such a fence to protect the interest of one of its lessees. As the District Court stated, the *Tulip* case is one that "would markedly impress itself on the owners of Middlesex, because the principals of Woodmoor Shopping Center [involved in *Tulip*] enjoined from a breach of the covenant giving the exclusive right to conduct

the only food market in a portion of the center, and the right to use certain parcels as parking areas in common with tenants of other stores in all of the Center, were the same persons who are the owners of Middlesex" (203 F. Supp. at 535; see also Pet. App. 20a-21a).[3]

The Court of Appeals agreed "with the District Judge that the restrictive covenant did not violate the common law for the reasons set forth in his opinion." (309 F. 2d at 310; Pet. App. 10a) It also found the *Tulip* case "most pertinent", noting particularly that in that case "the Court of Appeals of Maryland expressly applied the rule that restrictive covenants should be strictly construed but, nevertheless, held that the grant to the tenants of the shopping center of the right to use the parking area for the benefit of itself and its patrons should be interpreted as exclusive so as to forbid the use of the parking area by other persons." (309 F. 2d at 311; Pet. App. 11a).

In sum, this case involves the use of a conventional lease provision and the construction of a curb on private property to protect tenants of a shopping area. Considering the undisputed facts and the settled premises of law, both courts below correctly decided

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[3] The covenant in the Shell-Middlesex lease is, as the District Court found, plainly reasonable, both as to time and geographical area.

> "Article 1A is, by its terms, limited in time to the duration of the defendant's lease, a period shorter than the maximum valid under Maryland law. In geographical scope, it is considerably more limited than the restrictive covenants upheld in the *Gourand* and *Griffin* cases; supra. (203 F. Supp. at 535; see also Pet. App. 21a)

The Court of Appeals agreed that the covenant was "reasonably limited in time and space". (309 F. 2d at 311; Pet. App. 10a)

that there was no conceivable basis for a cause of action either under the Sherman Act or the common law of Maryland.

CONCLUSION

The decision below is correct and there is no conflict of decisions. No important question of law is presented calling for review by this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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